Supreme Court, U.S.
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No. 97-

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1997

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DENNIS OLIVARES,

*Petitioner,*

v.

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION,

*Respondent.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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## PETITION FOR A WRIT OF CERTIORARI

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HLPP

## QUESTION PRESENTED

Whether a federal agency violates section (e)(2) of the Privacy Act — which directs agencies to obtain personal information from individuals themselves, rather than third parties, "to the greatest extent practicable," 5 U.S.C. § 552a(e)(2) — when the agency conducts a secret investigation of an employee's background without making any effort to contact the employee, and when there is no argument that contacting the employee would in any way compromise the investigation?

## PARTIES TO THE CASE

The sole petitioner here, Dennis Olivares, seeks review of a decision of the United States Court of Appeals for the Fourth Circuit. Olivares was the plaintiff in the United States District Court for the District of Maryland and the appellant in the Fourth Circuit. The sole respondent here, the National Aeronautics and Space Administration, was an appellee in the Fourth Circuit and a defendant in the district court. Other defendants/appellees in the proceedings below were NASA employees Daniel Goldin, Lawrence Watson, Roger Jenkin, Betty Brocki, Donald Kreuger, Patrick Chris Schwartz, John L. Ferguson, and Janet Ruff; GESTA union officers Calvin W. Curlen and Harvey Safren; and other individuals whose identities were unknown to plaintiff and thus were designated as John/Jane Does. There were no other parties in the proceedings below.

## TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ..... v

OPINIONS BELOW ..... 1

JURISDICTION OF THIS COURT ..... 1

RELEVANT STATUTE ..... 2

STATEMENT OF THE CASE ..... 2

A. Section (e)(2) Of The Privacy Act ..... 3

B. Factual Background ..... 5

1. Olivares' Application For Employment And The 1987 Inquiry Into His Academic Qualifications ..... 5

2. NASA's Secret 1989 Investigation Of Olivares' Academic Credentials ..... 6

REASONS FOR GRANTING THE WRIT OF CERTIORARI .....10

THERE IS A SPLIT IN THE CIRCUITS ON AN ISSUE OF STATUTORY CONSTRUCTION OF GREAT IMPORTANCE TO ALL FEDERAL EMPLOYEES AND OTHER INDIVIDUALS PROTECTED BY THE PRIVACY ACT ..... 10

I. The Panel Ruling Contradicts The Plain Terms Of the Privacy Act And Erodes The Privacy Act Rights Of Federal Employees ..... 10

Page

II. There Is A Conflict Between The Two Circuits Where Most Federal Employees Work And Reside Regarding The Meaning Of Section (e)(2) Of The Privacy Act And Its Application To Investigations Of Federal Employees ..... 13

CONCLUSION ..... 17

APPENDIX:

Opinion of the United States Court of Appeals for the Fourth Circuit ..... 1a

Opinion of the United States District Court for the District of Maryland ..... 8a

Court of Appeals' Denial of Rehearing ..... 20a

Sample Leave Form ..... 23a

## TABLE OF AUTHORITIES

**Cases:** **Page**

*Brune v. IRS*,
861 F.2d 1284 (D.C. Cir. 1988) ..... 13

*Dickson v. OPM*,
828 F.2d 32 (D.C. Cir. 1987) ..... 13

*Doe v. United States*,
821 F.2d 694 (D.C. Cir. 1987) ..... 3, 11

*Waters v. Thornburgh*,
888 F.2d 870 (D.C. Cir. 1989) ..... *passim*

**Federal Statutes And Regulations:**

Privacy Act,

5 U.S.C. § 552a ..... *passim*

5 U.S.C. § 552a(e)(2) ..... *passim*

5 U.S.C. § 552a(g)(4)(A) ..... 5

**Legislative History:**

Analysis of House and Senate Compromise
Amendments to the Federal Privacy Act,
120 Cong. Rec. 40,405 (1974) ..... 4

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## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is unpublished and appears in the Appendix to this petition ("Pet. App.") at 1a-7a. The district court's opinion is published at 882 F. Supp. 1545 and the portions pertinent to this petition appear in the Appendix at 8a-19a.

## JURISDICTION OF THIS COURT

The ruling of the United States Court of Appeals for the Fourth Circuit was issued on December 3, 1996. Petitioner's petition for rehearing and suggestion for rehearing *en banc* were denied on January 29, 1997. See Pet. App. 20a. On April

4, 1997, Chief Justice Rehnquist entered an order extending the time for petitioner to file a petition for a writ of certiorari to May 29, 1997. This Court has jurisdiction over the case pursuant to 28 U.S.C. § 1254(1).

## RELEVANT STATUTE

Section (e)(2) of the Privacy Act of 1974, 5 U.S.C. §552a(e)(2), provides that

> [e]ach agency that maintains a system of records shall . . . collect information to the greatest extent practicable directly from the subject individual when the information may result in adverse determinations about an individual's rights, benefits and privileges under Federal programs.

## STATEMENT OF THE CASE

This petition involves a conflict in the Circuits regarding the meaning of one of the most vital safeguards of personal privacy embodied in the Privacy Act of 1974. To discourage federal agencies from conducting secret investigations of employees and other individuals who may be the subject of government files, section (e)(2) of the Act directs agencies to obtain personal information from the individuals themselves — rather than from third parties — "to the greatest extent practicable." 5 U.S.C. §552a(e)(2).

The Fourth Circuit and the D.C. Circuit have now reached opposite conclusions on how that provision should be construed and, more specifically, how it should be applied to information supplied by federal employees. Thus, the D.C. Circuit has ruled that section (e)(2) requires a federal agency investigating statements made on a federal employee's leave form to first seek corroborating information directly from that

employee before contacting third parties. *Waters v. Thornburgh*, 888 F.2d 870 (D.C. Cir. 1989). In the ruling at issue here, however, the Fourth Circuit reached precisely the opposite result, holding that the respondent National Aeronautics and Space Administration ("NASA") did not violate section (e)(2) when it conducted a clandestine investigation of petitioner's academic background years after petitioner applied for, and obtained, federal employment.

As discussed further below, review in this Court is warranted because of this Circuit split, and because of the adverse effect of the Fourth Circuit's ruling on the Privacy Act rights of all federal employees. First, however, petitioner will briefly describe the statutory scheme and the background of this case.

### A. Section (e)(2) Of The Privacy Act

In enacting the Privacy Act in 1974, Congress recognized that the "privacy of an individual is directly affected by the collection, maintenance, use and dissemination of personal information by Federal agencies," and that the "opportunities for an individual to secure employment . . . and other legal protections are endangered by the use of certain information systems." Pub. L. 93-579, section 2(a). To prevent these abuses, the Act imposes duties on all federal agencies that maintain "systems of records" regarding individuals.

In effect, "[t]he Act was designed to create a code of fair information practices to govern federal agencies that collect, store, and disseminate personal information about [individuals]." *Doe v. United States*, 821 F.2d 694, 699 (D.C. Cir. 1987) (*en banc*) (internal citation omitted). One of the statute's principal safeguards is embodied in section (e)(2), which requires that agencies must "collect information to the greatest extent practicable directly from the subject individual

when the information may result in adverse determinations about an individual's rights, benefits and privileges under Federal programs." Id. at § 552a(e)(2).

Congress explained that this provision was designed to "discourage the collection of personal information from third party sources and therefore to encourage the accuracy of Federal data gathering." *Analysis of House and Senate Compromise Amendments to the Federal Privacy Act*, 120 Cong. Rec. 40,405, 40,407 (1974), *reprinted in* Legislative History of the Privacy Act of 1974, at 991. Hence,

> it supports the principle that an individual should to the greatest extent possible, be in control of information about him which is given to the government. This may not be practical in all cases for financial or logistical reasons or because of other statutory requirements. *However, it is a principle designed to insure fairness in information collection which should be instituted wherever possible.*

*Id.* (emphasis added). As summarized by the D.C. Circuit, the

> point of the provision[] is not to give the agency the option of choosing which source — the subject of the investigation or some third party — would provide the most accurate information; rather, *it reflects congressional judgment that the best way to ensure accuracy in general is to require the agency to obtain information 'directly from the individual whenever practicable.'*

*Waters, supra*, 888 F.2d at 874 (emphasis added), *quoting* OMB Privacy Act Guidelines, 40 Fed. Reg. 28,949, 28,961 (1975).

Subsection (g) of the Privacy Act authorizes "civil remedies" for violations of the Act's requirements. Thus,

individuals may bring actions in federal district court when agencies fail to comply with requirements of the Act and, "if the court determines that the agency acted in a manner which was intentional or willful, the United States shall be liable to the individual" for "actual damages," but "in no case shall an individual entitled to recover receive less than the sum of $ 1,000 . . .." 5 U.S.C. § 552a(g)(4)(A).

## B. Factual Background

### 1. Olivares' Application For Employment And The 1987 Inquiry Into His Academic Qualifications

The basic facts underlying this petition are straightforward and undisputed. Petitioner Dennis Olivares applied for employment with NASA's Goddard Space Flight Center in 1986 and was hired in November of that year. To gain employment, he submitted the standard application for government employment known as an "SF-171." That form requires each individual to provide detailed personal information, including his prior "work experience," his assessment of his "special qualifications and skills," and a "certificate of scholastic achievement."

The SF-171 submitted by Olivares indicated that he had attended George Washington University, where he had received a J.D. and M.A., and had attended Loyola University in New Orleans for undergraduate work. Fourth Circuit Joint Appendix ("J.A.") 203; Pet. App. 3a. Along with the Form 171 itself, Olivares attached a required "List of College Courses and Certificate of Scholastic Achievement" which enumerated the classes he had taken, and stated that he had earned undergraduate degrees from Loyola University in Philosophy and Physics. J.A. 206-213.

As is standard practice when an individual is seeking employ-

ment with the federal government, the Office of Personnel Management ("OPM") conducted a background investigation into Olivares' qualifications, including his academic qualifications. In an interview with the OPM investigator, Olivares volunteered the fact that, while he had completed a joint program in Physics and Philosophy at Loyola, his diploma read only "Philosophy" because Loyola's policy was to require graduating students who had, in fact, *earned* multiple degrees to choose only one for *listing* on the diploma certificate. J.A. 264; Pet. App. 4a.

After receiving OPM's report, the Head of the Personnel Management Branch at Goddard asked one of his subordinates "to verify Olivares' educational credentials . . .." Pet. App. 11a. After making inquiries to Loyola, that employee reported that "Dennis Olivares did in fact participate in a dual degree program at Loyola *and completed both programs*." J.A. 192 (emphasis added); *see also* Pet. App. 11a.

On the basis of that report, as summarized by the district court, NASA "found no cause to question further Olivares' suitability for employment and Olivares remained at his post at NASA." Pet. App. 11a. As of 1987, therefore, NASA had completed its investigation of plaintiff's qualifications, and plaintiff began working as a full-time employee at Goddard.

### 2. NASA's Secret 1989 Investigation Of Olivares' Academic Credentials

Following his hiring, supervisors characterized Olivares' work as an engineer as "exemplary" and "superior." J.A. 285, 287. Yet, in 1989, NASA officials embarked on a clandestine investigation of Olivares' academic credentials, although that matter had seemingly been resolved when Olivares was hired two years earlier. As the district court noted, "[c]ontemporaneous events" — which are described

below — "lend context to," and help explain why, "[t]he question of Olivares' educational credentials surfaced again . . . ." Pet. App. 11a, 12a.

In late 1988, Olivares, who is Mexican-American, raised concerns with an Equal Employment Opportunity Counselor that he was not receiving promotions, awards, and other benefits to which he believed he was entitled. Pet. App. 12a. Several months later, NASA officials who were not involved in assessing Olivares' suitability for employment in 1987 initiated another investigation into his academic qualifications to be a NASA engineer. Pet. App. 12a.

According to John Ferguson, the Head of the Labor and Employee Relations Office at Goddard, in early 1989, Ferguson was "contacted by P. Christopher Schwartz, Olivares' immediate supervisor, who expressed 'serious doubts' about whether Olivares was qualified for his position." Pet. App. 12a. Ferguson then reviewed the records which had already been compiled about Olivares, including the 1987 documents which indicated that the agency had already explored and resolved questions concerning his academic background. J.A. 198.

Nevertheless, "Ferguson deemed it appropriate to verify Olivares academic credentials yet again *without, however, attempting to contact Olivares about the matter first.*" Pet. App. 12a (emphasis added). Accordingly, NASA initiated an entirely new investigation into whether Olivares was academically "qualified for his position," including by reexamining whether Olivares had indeed earned an undergraduate degree in Physics, in addition to Philosophy, more than a decade earlier. *Id.*

It is undisputed that neither Ferguson nor any other NASA official contacted Olivares — at any time — even to inform him about this inquiry, let alone to afford him an opportunity to provide information responsive to the agency's new con-

cerns. Pet. 12a. Indeed, rather than obtain information from Olivares "to the greatest extent practicable," 5 U.S.C. § 552a(e)(2), no one from NASA made a phone call, wrote a letter, set up a meeting, or took any other step to solicit information from Olivares in connection with the 1989 investigation. Instead, NASA made several secret inquiries to Loyola and other academic institutions which Olivares had attended years earlier, although the agency never even contacted those school officials — such as Olivares' professors in the Physics Department — who would be in the best position (other than Olivares himself) to provide detailed information regarding Olivares' engineering related course work (J.A. 20).

Following this secret, incomplete investigation, NASA officials prepared a highly damaging memorandum for inclusion in Olivares' personnel file (J.A. 146); Pet. App. 12a. In contrast to the favorable conclusion reached by the agency when Olivares was hired, the new memorandum suggested that Olivares may never have been academically qualified to be an engineer at NASA and, even worse, that Olivares had intentionally set out to deceive NASA in some material respect about his academic credentials. *Id.*[1]

Olivares did not learn about the secret investigation — and the harmful memorandum stemming from it — until nearly *three years later*, when he submitted a general request for agency records regarding himself under both the Privacy Act and Freedom of Information Act, 5 U.S.C. § 552. Pet. App.

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[1] If NASA *had* sought to obtain information from Olivares, he could have provided written confirmation of the engineering related courses he had taken at Loyola. As suggested above, he could also have steered NASA to officials in Loyola's Physics Department, who would have confirmed that Olivares had completed all necessary course work for a degree in Physics, and thus it had been entirely his choice whether his undergraduate diploma read "Physics" or "Philosophy." (J.A. 20).

13a. Only then did he realize that the agency had conducted an investigation of his academic qualifications in 1989 and that, as a result, NASA officials were stating that Olivares had "falsif[ied]" his Form 171; that he was "not academically qualified" to be an engineer at NASA; and that he should be fired or even prosecuted (J.A. 93, 105, 250).

Olivares then brought this lawsuit in federal district court in Baltimore, asserting that NASA's secret investigation constituted a flagrant violation of the Privacy Act, and seeking declaratory relief and damages. See 5 U.S.C. § 552a(g) (Privacy Act jurisdictional provision). Prior to even allowing discovery, however, the district court granted summary judgment for NASA. A panel of the Fourth Circuit affirmed, "agree[ing] with the district court" that NASA's secret investigation in 1989 did not violate section (e)(2), and that NASA was under no obligation even to inform Olivares about that investigation at any time, or to ask him for information that might have resolved the agency's new concerns about his academic qualifications. Pet. App. 4a. Instead, the Court concluded that, "*as a matter of law,* NASA contacted . . . Olivares directly 'to the greatest extent practicable'" because it was "merely attempting to verify information" that Olivares had provided in his Form 171. Pet. App. 6a (emphasis added).

As the Court further explained, "[b]y submitting an SF-171, an applicant is on notice that the information provided is subject to verification." *Id.* Hence, under the Fourth Circuit's view, merely by applying for federal employment, Olivares had somehow "consent[ed]" to a secret investigation of his academic credentials two years after he was hired as a full-time employee of NASA. *Id.*

Olivares then petitioned for rehearing by the panel, and also suggested the appropriateness of rehearing en banc, based largely on the conflict between the panel opinion and the D.C.

Circuit's ruling in *Waters*. The Fourth Circuit denied rehearing, without any accompanying explanation. Pet. App. 20a-21a.[2]

## REASONS FOR GRANTING THE WRIT OF CERTIORARI

### THERE IS A SPLIT IN THE CIRCUITS ON AN ISSUE OF STATUTORY CONSTRUCTION OF GREAT IMPORTANCE TO ALL FEDERAL EMPLOYEES AND OTHER INDIVIDUALS PROTECTED BY THE PRIVACY ACT

### I. The Panel Ruling Contradicts The Plain Terms Of The Privacy Act And Erodes The Privacy Act Rights Of Federal Employees.

In contravention of the language and purpose of the Privacy Act, the Fourth Circuit's ruling opens the door to secret agency investigations of federal employees and other individuals, even where there is no legitimate reason for the agency to refrain from contacting the individual before making inquiries to third parties. As the D.C. Circuit reasoned in *Waters*, the Privacy Act is "fundamentally concerned with privacy" and, more specifically, section (e)(2) "supports 'the principle that an individual should to the greatest extent possible be in

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[2] In addition to requesting rehearing on the basis of the importance of the legal issue and the conflict in the Circuits, Olivares' rehearing petition also pointed to a blatant factual inaccuracy in the panel ruling—*i.e.*, an assertion by the panel, unaccompanied by any citation to the record, that the 1989 investigation was somehow related to "subsequent SF-171s" submitted by Olivares. Pet. App. 6a. Although's Olivares' rehearing petition explained that this assertion had no support in the record and was simply wrong, the Fourth Circuit denied the rehearing petition without even asking NASA for a repsonse.

control of information about him which is given to the government . . . a principle designed to insure fairness in information collection which should be instituted whenever possible.'" 888 F.2d at 875 (citation omitted).

In contrast, the Fourth Circuit ruling runs roughshod over those basic Privacy Act principles and, more particularly, the patent purpose of section (e)(2). It does so by permitting a federal agency to embark on a secret investigation of an employee's background years after the individual has been hired, without ever bothering even to *inform* the individual about the investigation — either before or after the secret investigation has been used to obtain information from third parties which may ruin the employee's reputation. In short, the ruling below invites precisely the kind of "squirrel[ing] away" of "McCarthyesque innuendo" which the Privacy Act was designed to halt. *Doe v. United States, supra,* 821 F.2d at 699.

Of even greater concern is the Fourth Circuit's rationale for why NASA could engage in a clandestine investigation of Olivares' academic qualifications without violating section (e)(2). As noted above, the Court stressed that Olivares could not enforce his rights under section (e)(2) because, "[b]y signing the SF-171" when he was first hired, he had somehow "consent[ed]" to secret inquiries into his academic record and other aspects of his personal life even years after he was hired. Pet. App. 6a.

The Fourth Circuit could point to nothing in the language, or even the legislative history of the Privacy Act, to support the notion that, merely by virtue of signing an application for federal employment, an individual has "consented" to secret inquiries to third parties long after gaining employment. To the contrary, as the D.C. Circuit has recognized, that approach simply nullifies the "congressional judgment that the best way to ensure accuracy in general is to require the agency to obtain information 'directly from the individual whenever prac-

icable.''' *Waters*, 888 F.2d at 874, *quoting* OMB Privacy Act Guidelines. Here, for example, when NASA developed ''serious doubts'' about Olivares' ''educational credentials,'' and consequently initiated its investigation of him in 1989 (Pet. App. 11a), it was certainly ''practicable'' for the agency to contact Olivares to ascertain whether he could provide information resolving the agency's ***new*** concerns.[3]

Moreover, if the Fourth Circuit's ''consent'' rationale could be used to deprive Olivares of his rights under section (e)(2), it could likewise be used to deprive ***any*** federal employee of such rights whenever an agency decides — even five, ten, or twenty years after hiring someone — to conduct a new ''investigation'' into the individual's job ''qualifications'' or, for that matter, into any of the other highly personal information contained in a Form 171.

Since plaintiff is in the same posture as anyone else who has ever filled out a Form 171, the rulings below have sweeping, disastrous implications for the Privacy Act rights of all federal employees who, under the Fourth Circuit's reasoning, are subject to clandestine inquiries years or even decades after being hired. This draconian result — which stands both section (e)(2) and the entire purpose of the Privacy Act on their head — warrants review by this Court.[4]

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[3] As noted above, *supra* at n. 2, the ruling below also refers to SF-171s seeking transfers, which were submitted by Olivares ''subsequent to his initial date of employment.'' Pet. App. 4a. Not only do these additional forms in no way waive Olivares' section (e) (2) rights, but there is nothing in the record to suggest that the 1989 investigation was conducted as a result of these forms.

[4] While ruling against Olivares, the Fourth Circuit also stated that ''we do not believe that a government employee by consenting to a proper investigation of information provided in his initial employment application, *i.e.*, the initial SF-171, ***necessarily*** provides his consent in perpetuity

## II. There is A Conflict Between The Two Circuits Where Most Federal Employees Work and Reside Regarding the Meaning Of Section (e)(2) Of The Privacy Act And Its Application To Investigations Of Federal Employees.

Review by this Court is also appropriate because there is now a clear conflict in the Circuits regarding the meaning of section (e)(2) and its specific applicability to investigations of federal employees. Moreover, this split is of enormous practical significance because it is between the two Circuits where most federal employees work and reside.

Thus, the Fourth Circuit's construction of section (e)(2) conflicts sharply with the D.C. Circuit's recent analysis of the same provision of the Privacy Act in *Waters*, which came to the *opposite* interpretation of section (e)(2) in factually indistinguishable circumstances. In Waters, the D.C. Circuit emphatically ruled that, "[i]n the context of an investigation that is seeking objective, unalterable information" — such as information pertaining to Olivares' academic credentials — section (e)(2) generally prohibits the kind of secret inquiry that occurred here. 888 F.2d at 873.[5]

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to government investigations of matters covered in the form." Pet. App. 4a (emphasis added). Yet the Court did not suggest any coherent basis on which to distinguish Olivares' situation from that of any other individual who applies for federal employment. Instead, the Court referred to the fact that OPM conducted a routine background investigation which involved an interview with Olivares when he was first hired, Pet. App. 6a—which, of course, is true of all individuals hired by the federal government. *See, e.g., Dickson v. OPM*, 828 F.2d 32 (D.C. Cir. 1987).

[5] Where an agency investigation does not seek "objective, unalterable information," the D.C. Circuit has concluded that a legitimate "fear of witness tampering" may excuse an agency's failure to first contact the subject of the records. *Waters*, 888 F.2d at 870-71, *citing Brune v. IRS*, 861 F.2d 1284 (D.C. Cir. 1988). That narrow exception did not apply in

In *Waters*, the plaintiff was a Justice Department employee who prepared a standard leave form requesting permission to take an extended leave for the purpose of preparing for and taking the Pennsylvania Bar exam. *Waters, supra,* 888 F.2d at 871. After he returned to work, he requested and received leave to satisfy a summons for jury duty during a particular time frame. *Id.* When he did not return to work as scheduled, his supervisor made inquiries of the jury commissioner and determined that Waters' jury duty had not started until eight days after his leave began. *Id.*

Waters' supervisor then "became suspicious about Waters' use of annual leave" to take the bar exam, and arranged to have the Chief of the Justice Department's Administrative Management Section contact the Pennsylvania Board of Law Examiners to determine whether Waters did, in fact, take the exam. *Id.* at 872. The Board then confirmed that Waters had taken the exam, thus ending the Justice Department inquiry into Waters' activities. *Id.* During these events, as with the 1989 investigation of Olivares at issue here, "Waters was never informed that the Department was also investigating his use of annual leave"; rather, he learned about the inquiry five months later "in unrelated correspondence with the Board" of Law Examiners, and then brought suit under the Privacy Act in federal court in Washington. *Id.*

The D.C. Circuit concluded that such a secret investigation violated the plain terms of the Privacy Act. Hence, reversing a district court ruling that rejected Waters' claim under section (e)(2), the Court instead ordered that summary

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*Waters* and has no relevance to this case, where NASA has never suggested that its 1989 investigation would have been impaired if Olivares had been contacted. Rather, as in *Waters*, the agency simply argues that it had no legal obligation to afford Olivares any opportunity to provide information in connection with the investigation.

judgment be entered for Waters on the question of whether the secret inestigation violated his Privacy Act rights as a matter of law. The Court ruled, following a comprehensive review of the statute's language and legislative history, that:

> In the context of an investigation that is seeking objective, unalterable information, reasonable questions about a subject's credibility cannot relieve an agency from its *responsibility to collect that information first from the subject.*
>
> . . .
>
> The investigators in this case could not reasonably have thought that Waters would be able to falsify or secrete evidence having to do with his attendance at the Pennsylvania bar exam.

*Id.* at 874 (emphasis added).

In reaching its conclusion, the D.C. Circuit rejected warious justifications for the government's failure to make any effort to contact Waters directly. In particular, the Court dismissed the rationale — expressly adopted by the Fourth Circuit here — that the government's clandestine inquiry did not violate section (e)(2) because it was merely "an attempt to verify information Waters had already provided" on the government leave form. *Id.* at 873 & n. 6. As the D.C. Circuit noted, "[i]f that were the case, then any federal employee who fills out an annual leave request would essentially be waiving his subsection (e)(2) rights under the Privacy Act." *Id.*

The Fourth Circuit's analysis and result here are impossible to reconcile with *Waters*. The cases come to opposite conclusions on a facially identical issue of statutory interpretation, with the D.C. Circuit ruling that agencies must contact individuals when they are conducting an "investigation that is seeking objective, unalterable information" pertaining to the individual, 888 F.2d at 873, and the Fourth Circuit holding,

"as a matter of law" that agencies may, consistent with section (e)(2), conduct such investigations *without* even informing the subject that they are doing so. *See* Pet. App. 5a ("'NASA could fairly undertake to clarify the matter directly with educational institutions again *and could do so without contacting Olivares*'") (quoting 882 F. Supp. at 1550) (emphasis added).

Moreover, the Fourth Circuit accepted the precise statutory argument rejected in *Waters, i.e.*, that an agency can justify a secret investigation of a government employee — even long after the individual has been hired — as simply "verification" of information previously provided on a government form. Pet. App. 6a. Thus, under the Fourth Circuit's approach, merely by submitting a standard government form, a federal employee "consents" to secret investigations of all matters pertaining to the form, *id.*, whereas the D.C. Circuit did "not accept" the identical argument that "any federal employee who fills out" a form "would essentially be waiving his subsection (e)(2) rights" under the Privacy Act. 888 F.2d at 873 n. 6.

This Circuit conflict not only sows unnecessary confusion as to the legal and practical import of a critical safeguard of the Privacy Act, but it creates particular inequity in view of the fact that most federal employees reside and work either in Washington, D.C., or in Virginia and Maryland, which are in the Fourth Circuit. Because of the conflicting approaches adopted in this case and *Waters*, federal employees who bring Privacy Act claims in the federal courts in Washington may obtain relief if they are subjected to secret investigations, while similarly situated employees who file such claims across the river in Alexandria, or in Baltimore, may not.[6]

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[6] The Fourth Circuit asserted that *Waters* is "distinguishable from the case at hand," Pet. App. 5a, but it did not articulate any meaningful difference between the two cases. For example, the Court suggested that

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: May 29, 1997

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its decision does not conflict with *Waters* because, in contrast to the government form at issue in that case, a Form 171 "clearly provid[es] that 'all items contained herein may be subject to investigation.'" *Id.* at 6a. But the leave forms at issue in *Waters* also enumerate a long list of organizations to which the forms may be released for investigatory purposes, and thus they reflect no more or less of a "waiver" of section (e) (2) rights than a Form 171. *See* Pet. App. 23a.

# United States Court of Appeals
## FOR THE FOURTH CIRCUIT

DENNIS OLIVARES,
*Plaintiff-Appellant,*
v.
NATIONAL AERONAUTICS AND SPACE ADMINISTRATION; DANIEL GOLDIN, Administrator; LAWRENCE WATSON, Chief Legal Counsel; ROGER JENKIN, Personnel Director; BETTY BROCKI, Personnel Management Specialist; DONALD KRUEGER, Electrical Engineering Division Chief; PATRICK CHRIS SCHWARTZ; JOHN L. FERGUSON, Labor Relations Officer; JANET RUFF, Public Relations Chief; CALVIN W. CURLEN, GESTA Union Officer; HARVEY SAFREN, GESTA Union Officer,
*Defendants-Appellees.*
and
OTHERS WHOSE IDENTITIES OR LIABILITIES AT THIS TIME ARE UNKNOWN TO THE PLAINTIFF AND THUS ARE HEREIN DESIGNATED AS JOHN/JANE DOES,
*Defendants.*

No. 95-2343

Appeal from the United States District Court
for the District of Maryland, at Baltimore.
Peter J. Messitte, District Judge.
(CA-92-3439-PJM)

Argued: October 29, 1996

Decided: December 3, 1996

Before NIEMEYER, WILLIAMS, and MOTZ, Circuit Judges.

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Affirmed by unpublished per curiam opinion.

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## COUNSEL

**ARGUED:** Eric Robert Glitzenstein, MEYER & GLITZENSTEIN, Washington, D.C., for Appellant. Perry F. Sekus, Assistant United States Attorney, Baltimore, Maryland; Alice Lane Bodley, MARTIN, BODLEY & DRAFT, P.C., Washington, D.C., for Appellees. **ON BRIEF:** Lynne A. Battaglia, United States Attorney, Baltimore, Maryland, for Appellees.

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Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

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## OPINION

PER CURIAM:

Dennis Olivares appeals the district court's orders granting summary judgment to his employer, the National Aeronautics and Space Administration (NASA) and certain individuals employed at NASA. The underlying relevant facts are set forth in the district court's opinion and will not be repeated here. *See Olivares v. NASA*, 882 F.Supp. 1545 (D. Md. 1995).

Olivares' principal claim is that the National Aeronautics and Space Administration (NASA) violated his rights under the Privacy Act, 5 U.S.C. § 522a(e)(2)(1994) when it intentionally undertook a "secret, highly damaging investigation" in 1989 into his academic background without collecting this information directly from him "to the greatest extent practicable."

§ 552a(e)(2).

To succeed on a Privacy Act claim, a plaintiff must establish that "(1) the agency failed to elicit information directly from him 'to the greatest extent practicable,' 5 U.S.C. § 522a(e)(2); (2) the violation of the Act was 'intentional or willful,' 5 U.S.C. § 552a(g)(4); and (3) this action had an 'adverse effect' on the plaintiff, 5 U.S.C. § 552a(g)(1)(D)." *Waters v. Thornburgh*, 888 F.2d 870, 872 (D.C. Cir. 1989).

NASA argues that it fulfilled its obligations under § 552a(e)(2) and elicited information from Olivares to the "greatest extent practicable" in three ways: (1) by requiring him to file a standard government employment application, an SF-171, in 1987 when Olivares originally applied for work from NASA; (2) by relying on the results of an investigation, including a personal interview with Olivares, conducted by the Office of Personnel Management (OPM), shortly after Olivares starting working at NASA in 1987; and (3) by relying on information which Olivares certified in twenty additional SF-171s he filed subsequent to his initial employment at NASA. In the SF-171, a government employee acknowledes "that all items contained herein may be subject to investigation prescribed by law; and consents "to the release of information concerning . . . capacity and fitness by employers, educational institutions, law enforcement agencies, and other individuals and agencies to duly accredited investigators."

When NASA hired Olivares in 1986, he stated on his SF-171 tht he had been awarded both a B.S. in physics and a B.A. in philosophy from Loyola University, and masters and law degrees from George Washington University. Shortly thereafter, an investigator from the Office of Personnel Management (OPM) conducted a background investigation of Olivares and met with him. During that interview, Olivares

explained that although he, in fact, completed a joint program at Loyola in physics and philosophy, his diploma was labeled "B.A. Philosophy" because Loyola demanded that graduating students designate only one field for listing on the diploma. In each of the SF-171s that Olivares subsequently filed, he similarly certified that he had been awarded both a B.S. in physics and a B.A. in philosophy from Loyola University.

Contrary to NASA's suggestions, we do not believe that a government employee by consenting to a proper investigation of information provided in his initial employment application, *i.e.*, the initial SF-171, necessarily provides his consent in perpetuity to government investigations of matters covered by the form. However, we agree with the district court that here "as a matter of law, NASA . . . contacted Olivares directly 'to the greatest extent practicable.' " *Olivares*, 882 F. Supp. at 1550.

First, NASA, through OPM, conducted a personal interview with Olivares in 1987. At that interview, Olivares was given an opportunity to provide any additional information regarding his academic credentials. Second, as the district court noted, each of the SF-171s which Olivares filed subsequent to his initial date of employment in 1986 "contained its own consent to the agency to illicit information in connection with his educational credentials" and thus "constituted a new and separate authorization to verify" this information. *Id.** As the district court further explained:

> The reality is that the official record of Olivares' degrees was inconsistent and confused from the

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* In his brief, Olivares argues that these subsequent SF-171s were filed after the 1989 investigation into his academic credentials and therefore cannot be "retroactively" applied to waive his rights. App. Brief at 42 n.19. The record before us, however, indicates that at least some of these SF-171s were filed prior to the agency's 1989 investigation.

> beginning. Olivares swore in 1986 and on multiple occasions thereafter that he held a Bachelor of Science Degree in Physics and a Master's Degree in Political Science. The report of the first investigation in 1987 showed he did not hold those two degrees, whereas the report of Shirley Smith that same year showed that Olivares' Bachelor degree was in Political Science, not Philosophy as Olivares claimed, and that he did hold a Masters degree in Political Science from George Washington. Venturing upon these conflicting reports at a later time, for whatever reason, and given Olivares' repeated oaths on all subsequent SF-171's consistent with his original version, NASA could fairly undertake to clarify the matter directly with the educational institutions again and could do so without contacting Olivares.

*Id.*

*Waters*, 888 F.2d 870, upon which Olivares so heavily relies, is clearly distinguishable from the case at hand. An employee of the U.S. Department of Justice, Waters had asked for leave from his position to study for the Pennsylvania bar. After he returned to work, Waters again asked for leave to satisfy a summons for jury duty. When he did not return to work when scheduled, his supervisor, James Bennett, called the jury commissioner who informed him that Waters was still on jury duty, but that this duty had not started until eight days after his leave began. Unsatisfied with Waters' explanation when asked about this, Bennett again contacted the jury commissioner who informed him that Waters had asked her to certify his presence for jury duty during days in which her records indicated he was not present. *id.* at 871-72.

Bennett then became suspicious of Waters' use of leave to take the bar exam. He asked Department personnel to contact the Pennsylvania Board of Law Examiners to confirm his attendance at the bar. After the Board requested, and the Department supplied, a written request for this information, the Board certified Waters' attendance at the bar. The district court found no violation of the Privacy Act, but the D.C. Circuit disagreed. *Id.* at 873. The court found that the Department should have gone first to Waters "for objective proof of his bar attendance, proof such as written correspondence informing him of his bar results, and his bar exam admittance ticket." *Id.* at 874.

In *Waters*, the Justice Department did not contact Waters directly before contacting the Pennsylvania Board. *Id.* at 874. Here, NASA did contact Olivares directly before contacting Loyola and George Washington University to verify his academic credentials. Both in the SF-171s as well as in the personal interview, Olivares was given an opportunity to provide information. In *Waters*, there was no basis for the Department's contention that it was merely attempting to verify information that Waters had already provided in a leave form. In contrast, the sole purpose of NASA's investigation was to verify the information that Olivares had provided in his initial SF-171, his subsequent SF-171s, as well as in his personal interview. By submitting an SF-171, an applicant is on notice that the information provided is subject to verification; the form clearly provides that "all items contained herein may be subject to investigation." By signing the SF-171, an applicant consents to the "release of information [from] educational institutions." A leave form contains no similar language, and therefore creats no similar expectation of verification.

The district court's recent opinion, *Dong v. Smithsonian Institution*, 1996 WL 636434 (D.D.C. 1996), is likewise

distinguishable. There, the court found that the Hirshhorn Museum had not "to the greatest extent practicable" procured information from Dong when investigating rumors of an unauthorized trip by Dong in which she accompanied a piece of art to another museum. The court found that Hirshhorn officials had violated § 552a(e)(2) when they contacted personnel at the other museum before approaching Dong. As in *Waters*, the situation here is distinct in that information was collected from Olivares initially.

In addition to his § 552a(e)(2) claim, Olivares asserts that NASA violated § 552a(e)(5), which requires an agency that maintains records used in making a determination about an individual to maintain such records "with accuracy, relevance, timeliness, and conpleteness as is reasonably necessary to assure fairness to the individual in the determination." The district court properly rejected Olivares' claim for amendment of the records under § 552a(g)(2)(A) on the grounds that "Olivares has failed to exhaust his administrative remedies" with regard to this claim. *Olivares*, 882 F. Supp. at 1551-52. Similarly, the district court was correct to reject Olivares' damages claim under § 552a(g)(4) on the grounds that NASA did not intentionally or wilfully violate the Privacy Act in maintaining the challenged records.

Finally, in view of our holding, summary judgment was also properly granted on Olivares' state tort claims against employee union leaders for assertedly disseminating defamatory statements about him. Counsel for Olivares conceded at oral argument that if, as we have held, summary judgment was properly granted on Olivares' Privacy Act claims, then there is no basis for federal jurisdiction on the related state tort claims.

*AFFIRMED*

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

| | | |
|---|---|---|
| DENNIS OLIVARES | * | |
| | * | |
| Plaintiff | * | |
| | * | CIVIL NO. |
| v. | * | PJM-92-3439 |
| | * | |
| NATIONAL AERONAUTICS AND SPACE ADMINISTRATION, et al. | * | |
| | * | |
| Defendant | * | |

OPINION

Dennis Olivares and his employer, National Aeronautics and Space Administration (NASA), have been at odds for a considerable time. Since at least 1989, Olivares has clashed with NASA over the conditions of his employment, causing him to file among other things Equal Opportunity Employment complaints, grievances through his union (the Goddard Engineers, Scientists and Technicians Association) and various requests under the Freedom of Information Act, 5 U.S.C. §552 and Privacy Act, 5 U.S.C. §552a. On December 8, 1992, Olivares filed the present suit against NASA and a number of individual NASA employees, seeking declaratory relief, a writ of mandamus, and damages for alleged violations of the Privacy Act and miscellaneous constitutional rights and for related torts including a claim under the Federal Tort Claims Act, 28 U.S.C. §2671 *et seq*. On March 12, 1993, Olivares sought leave to file an Amended Complaint, attaching the proposed pleading to his motion. By the Amended Complaint he sought, besides the relief sought in the original Complaint, to join an additional individual defendant, to recover damages for records collected and maintained at NASA pertaining to alleged threats made

by him against co-employees, and to add counts for defamation and intentional interference with contract under Maryland law.

Although the Amended Complaint is the last operative complaint filed by Olivares, the Court's predecessor in these proceedings (Nickerson, J.), pursuant to Defendants' motion, has pared down the number of parties and causes of action quite dramatically. All individual defendants have either been dismissed or permission to add them denied; only NASA remains as a defendant. The sole claims that survive are those under (1) the Privacy Act, 5 U.S.C. §552a(e)(2) pertaining to Olivares' educational credentials and (2) the Privacy Act, 5 U.S.C. §552a(e)(2), (e)(5), and (g)(1) pertaining to incidents in which it is alleged that Olivares threatened co-employees and on one occasion possessed a firearm at work. As to those causes of action, NASA has renewed its Motion to Dismiss or, in the Alternative, for Summary Judgment. Olivares opposes these Motions and has filed his own Cross-Motion for Summary Judgment.

The Court has determined to grant NASA's Motion for Summary Judgment and to deny the Cross-Motion of Olivares.

II.

Summary judgment is appropriate if "there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). When a moving party supports its motion under Rule 56 with affidavits and other appropriate materials pursuant to the rule, the opposing party "may not rest upon the mere allegations or denials of the adverse party's pleading, but . . . the response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed. Civ. P. 56(e). Summary judgment is appropriate "where

the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there (being) no genuine issue at trial." *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

III.

Although the Amended Complaint is difficult to follow, the undisputed facts pertaining to Olivares' eductional credentials appear to be these:

Beginning with his initial employment in 1986 at NASA's Goddard Space Flight Center in Greenbelt and as part of his application for several different positions at the Center thereafter, Olivares filed a number of SF-171's, the standard Government application for employment. On each of these SF-171's Olivares stated inter alia, that he had obtained a Bachelor of Science Degree in Physics from Loyola University (in New Orleans) and a Master's Degree in Political Science from George Washington University (in the District of Columbia). Each SF-171 contained language by which Olivares consented to the investigation of information in the statement, specifically authorizing educational institutions to release information to investigators, personnel staffing specialists, and other authorized employees of the Federal Government.[1] Each statement was subscribed and sworn by Olivares.

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[1] The statement, in pertinent part, read:

"I have completed this Statement with the knowledge and understanding that any or all items contained herein may be subject to investigation prescribed by law or Presidential directive and I consent to the release of information concerning my capacity and fitness by employers, educational institutions, law enforcement institutions, and other individuals and agencies, to duly accredited investigators, Personnel Staffing Specialists, and other authorized employees of the Federal Government for that purpose."

In connection with his initial employement, a position requiring a security clearance, NASA requested that its Office of Personnel Management (OPM) conduct a limited background investigation. The OPM investigator contacted the educational institutions Olivares had listed on his application and conducted a personal interview with him. Based on his contact with the schools and the interview, the investigator reported that Olivares did not in fact possess two educational degrees claimed on his SF-171, viz., the 1975 Bachelor's Degree in Physics from Loyola and the 1985 Master's Degree from George Washington University, noting these as "potentially actionable issues." Jerry Simpson, Head of the Personnel Management Branch at Goddard, thereupon asked a Personnel Staffing Specialist, Shirley Smith, to verify Olivares' educational credentials a second time. As indicated by a memorandum dated July 27, 1987, Smith confirmed with Loyola that while Olivares had participated in a dual degree program in physics and political science, since Loyola did not award two Bachelor Degrees, Olivares had chosen the degree in political science. Smith also verified that Olivares had received both Masters and Law Degrees from George Washington. On the basis of Smith's report, Simpson found no cause to question further Olivares' suitability for employment and Olivares remained at his post at NASA. The Smith to Simpson memorandum dated July 27, 1987 and Simpson's memorandum to the Security office, dated November 16, 1987, were maintained in Olivares' security file, but not in his file in the Office of Labor and Employee Relations.

The question of Olivares' educational credentials surfaced again in approximately March 1989 when, according to John Ferguson, Head of Goddard's Labor and Employee Relations Office, he was contacted by P. Christopher Schwartz, Olivares' immediate supervisor, who expressed "serious doubts" about

whether Olivares was qualified for his position.[2] Ferguson deemed it appropriate to verify Olivares' academic credentials yet again without, however, attempting to contact Olivares about the matter first. Instead, Betty Brocki, a Personnel Management Specialist, called Loyola directly and was advised that Olivares had received a G.A. degree in "philosophy" and that, while he had completed credits for a double major, he had received no other degree.[3] Brocki called George Washington and was told that, although Olivares had received a J.D. degree from that institution and had earned 15 credit hours toward a Masters Degree as of May 1985, no award of a Master Degree in political science could be verified.[4] Presumably Brocki's report was placed in Olivares' general personnel file, although no immediate action appears to have been taken against him.

Contemporaneous events, however, lend context to Ferguson's inquiry. As of March 31, 1989, Olivares had filed the first of what were to be four employment discrimination complaints against NASA, this one alleging discrimination based on his race (Hispanic) and national origin (Mexican), as well as alleged retaliation for his pursuit of the grievance process. It was in connection with his review of the multi-volume

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[2] According to the decision of the Administrative Law Judge in Olivares' consolidated EEO proceedings, Olivares was hired by NASA Goddard Space Flight Center in November 1986 as an Electronics Engineer; late 1987 or early 1988, he transferred to a unit working with Small Business Innovative Research programs; in 1988 he worked on assignments with the Space Station and with Global Geospace Science; and in 1989 he worked in the Tracking Data Relay Satellite System (TDRS) and advanced TDRS.

[3] In contrast, Shirley Smith's memorandum of July 27, 1987, reported that Olivares' degree from Loyola was in "Political Science", not "Philosophy".

[4] On his SF-171's, Olivares claimed completion of 33, as opposed to 15, credit hours toward his Masters Degree as of May, 1985.

report based his EEO complaint that Olivares claims he discovered the Brocki memorandum, the basis of his present claim. Reading affidavits from co-employees suggesting that he might have lied about his educational background, Olivares launched a wholesale request for his employment records from NASA, combined with a demand that alleged inaccuracies in those records be amended. Although many of the documents he sought pertained to matters well beyond his educational credentials and were, for various reasons, eventually denied him, in the Fall of 1991 Olivares received a copy of the 1989 Brocki memorandum setting forth her efforts to verify Olivares' degrees. Upon that, Olivares has fashioned his claim that NASA violated 5 U.S.C. 552a(e)(2) of the Privacy Act.

IV

The Privacy Act of 1974, 5 U.S.C. §552a(e)(2), provides that:

> [e]ach agency that maintains a system of records shall . . . collect information to the greatest extent practicable directly from the subject individual when the information may result in adverse determinations about an individual's rights, benefits and privileges under Federal programs.

Citing the Congressional staff analysis relative to this provision, the U.S. Court of Appeals for the District of Columbia in *Waters v. Thornburgh*, 888 F.2d 870 (D.C. Cir. 1989), observed that:

> [t]he section was designed to "discourage the collection of personal information from third party sources and therefore to encourage the accuracy of Federal data gathering. * * * The Act is fundamentally concerned with privacy. It supports "the

> principle that an individual should to the greatest extent possible be in control of information about him which is given to the government . . . a principle designed to insure fairness in information collection which should be instituted wherever possible."

888 F.2nd at 874-75.

*Waters* highlights the three elements necessary to establish a violation of the Act. A plaintiff must show that (1) the agency failed to elicit information directly from him "to the greatest extent practicable", 5 U.S.C. §552a(e)(2); (2) violation of the Act was "intentional or wilful", 5 U.S.C. §552a(g)(4); and (3) the action had an "adverse effect" on him, 5 U.S.C. §552a(g)(1)(D), *Waters*, 888 F.2d at 872. The Court will refer to this claim of Olivares as his "*Waters* claim".

Olivares contends that, when NASA attempted to re-verify his educational credentials in March 1989, it failed to elicit information from him "to the greatest extent practicable" and did so "intentionally and wilfully", all of which had an "adverse effect" upon him. He claims, in consequence, no less than $410,000.00 in damages.[5] NASA insists that in fact it did elicit information directly from Olivares "to the greatest extent practicable", but says even if it did not, Olivares has failed to show that it acted intentionally or wilfully or with any adverse effect upon him. The court considers the three factors.

A. *"To the Greatest Extent Practicable"*

The phrase "to the greatest extent practicable" has a "blurred edge, [an] uncertain line.[6] It depends on the facts

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[5] If a plaintiff proves the three elements constituting a violation of the Privacy Act, he is entitled to the greater of $1,000.00 or actual damages sustained. 5 U.S.C. §552a(g)(4).

[6] "Those of us whose lives have been spent on the bench or at the bar . . . know the value of the veiled phrase, the blurred edge, the uncer-

and circumstances of the particular case. It is one thing for an agency to pursue a rumor about how an employee spends his leave time without first talking to the employee, as in *Waters*. It is a very different thing when the agency's inquiry pertains to the individual's educational credentials and the individual has executed an express authorization for the agency to inquire about those credentials, then specifically certified on his SF-171 that:

> I have completed this Statement with the knowledge and understanding that any or all items contained herein may be subject to investigation prescribed by law or Presidential directive and I consent to the release of information concerning my capacity and fitness by employers, educational institutions, law enforcement institutions, and other individuals and agencies, to duly accredited investigators, Personnel Staffing Specialists, and other authorized employees of the Federal Government for that purpose.

From all appearances, the relevant information regarding his credential had already been elicited directly from Olivares to the greatest extent practicable. Olivares, in fact, does not question the legitimacy of the initial limited background investigation conducted by OPM in 1987, including the contacts made by the OPM investigator and Shirley Smith at that time. What he argues is that NASA's attempt to re-verify his credentials in March 1989 was a separate investigation as to which he was entitled to be contacted in advance; in effect that his consent was limited in time to the first investigation and invalid thereafter. The Court disagrees.

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tain line." *Cardozo; Law and Literature (Harcourt, Brace & Company, 1931) p.137.*

In the first place, there is nothing on the face of the initial SF-171 tht limits the duration of the consent. The paragraph tht precedes the paragraph establishing the consent provides that "[a] false answer to any question in this Statement may be grounds for not employing you, *or for dismissing you after you begin work*. . ." (Emphasis supplied). Such language unmistakably comprehends the possibility of follow-up. Moreover, as a matter of policy, there is no reason why the consent should be limited in time. Delays may occur in verifying information; upon review, discrepancies may be noted with regard to matters previously verified. An applicant earns no vested right in inaccurate information, whether supplied by him intentionally or unintentionally. Indeed, if an individual becomes aware of misinformation stated on his application, it is presumably incumbent upon him to modify his application in appropriate fashion.

Finally, even if Olivares were correct that a consent given in an initial SF-171 is not valid "in perpetuity", he is hardly in a position to make that argument. Each of the multiple SF-171's filed by him therafter contained its own consent to the agency to elicit information in connection with his educational credentials. Each constituted a new and separate authorization to verify.

The reality is that the official record of Olivares' degrees was inconsistent and confused from the beginning, Olivares swore in 1986 and on multiple occasions thereafter that he held a Bachelor of Science Degree in Physics and a Master's Degree in Political Science. The report of the first investigation in 1987 showed he did *not* hold those two degrees, whereas the report of Shirley Smith that same year showed that Olivares' Bachelor degree was in Political Science, not Philosophy as Olivares claimed, and that he did hold a Masters degree in Political Science from George Washington. Ventur-

ing upon these conflicting reports at a later time, for whatever reason, and given Olivares' repeated oaths on all subsequent SF-171's consistent with his original version, NASA could fairly undertake to clarify the matter directly with the educational institutions again and could do so without contacting Olivares. On these facts, as a matter of law, NASA had already contacted Olivares directly "to the greatest extent practicable".

B. *"Intentional or Wilful Conduct"*

Assuming the Court were to find that NASA's conduct violated the Privacy Act, Olivares could still not recover damages unless he could show that the "agency acted in a manner which was intentional or wilful" *See* 5 U.S.C. §552a(g)(4). *Waters v. Thornburgh*,. 888 F.2d at 875. "Intentional or willful" has been variously defined as "somewhat greater than gross negligence", *Id.*, or an act committed "without grounds for believing it to be lawful, or by flagrantly disregarding others rights under the Act." *Albright v. United States*, 732 F.2d 181, 189 (D.C. Cir. 1984). Mere evidence that the Government has acted negligently will not suffice nor will it do to show that the Government acted in a disjointed or confused manner or inadvertently to contravene the Act, *Waters v. Thornburgh*, 888 F.2d at 875-876.

In the case at hand, it cannot even be maintained that NASA acted negligently. Quite to the contrary, NASA's actions were prudent as a matter of law. Thus, for the sake of argument the Court will assume that Olivares' initial consent was limited to his initial limited background investigation and that his several subsequent SF-171's have no bearing. Nevertheless, given the discrepancies in the record that existed with regard to his educational background from the outset, NASA was entitled to verify and correct Olivares' record any time those discrepancies might come to light. In no sense did NASA come

close to acting "intentionally or wilfully" within the meaning of the Privacy Act.

C. *Adverse Effect*

Accepting for present purposes that emotional trauma alone suffices to qualify as "adverse effect" under (g)(1)(D) of §552a, *see Quinn v. Stone*, 978 F.2d 126 (3rd Cir. 1992), *Albright v. U.S.*, 732 F.2d 181 (D.C. Cir. 1984), Olivares has undoubtedly alleged and the Court is prepared to believe that he has suffered stress and emotional anguish in his clash with NASA. However that may be, Olivares' feelings are compensable if and only if he can establish a violation of the Privacy Act that was committed intentionally and wilfully. Since, as stated, he has failed to establish the first two elements of his *Waters* claim, he is without remedy for his distress in this Court. NASA is entitled to Summary Judgment on the claim pertinent to Olivares educational credentials.[7]

* * *

[7] To date, Olivares and NASA are still apparently unable to agree about his educational credentials. Nasa has asked Olivares to submit a copy of his degrees or transcripts and Olivares has refused to do so. In the EEO proceedings, Olivares' refusal to submit the requested verification resulted in an adverse inference being drawn by the Administrative Law Judge to the effect that Olivares in fact did not possess the degrees. The matter would seem resolvable if Olivares were simply to provide the requested data. If he chooses not to do so, then he has forfeited his sole remedy. Money damages in any amount, much less $410,000.00 are out of the question.

For all recited reasons, Olivares' request for relief based on NASA's alleged violations of the Privacy Act must fail.

A separate Order will be entered granting NASA's Motion for Summary Judgment and denying Olivares' Cross-Motion.

/s/ Peter J. Messite

Peter J. Messitte
United States District Judge

April 27, 1995

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 95-2343
CA-92-3439-PJM

Filed
January 29, 1997

DENNIS OLIVARES
Plaintiff - Appellant

v.

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION: DANIEL GOLDIN, Administrator;LAWRENCE WATSON, Chief Legal Counsel; ROGER JENKIN, Personnel Director; BETTY BROCKI, Personnel Management Specialist; DONALD KRUEGER, Electrical Engineering Division Chief; PATRICK CHRIS SCHWARTZ; JOHN L. FERGUSON, Labor Relations Officer; JANET RUFF, Public Relations Chief; CALVIN W. CURLEN, GESTA Union Officer; HARVEY SAFREN, GESTA Union Officer
Defendants - Appellees

and

OTHERS WHOSE IDENTITIES OR LIABILITIES AT THIS TIME ARE UNKNOWN TO THE PLAINTIFF AND THUS ARE HEREIN DESIGNATED AS JOHN/JANE DOES
Defendants

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On Petition for Rehearing with Suggestion for Rehearing in Banc

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The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion

for rehearing in banc, and

As the panel considered the petiton for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Patricia S. Connor

CLERK

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Filed
February 6, 1997

No. 95-2343
CA-92-3439-PJM
Olivares v. NASA

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MANDATE

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The judgment of this Court dated 12/3/96 takes effect today.

PATRICIA S. CONNOR
CLERK

BEST AVAILABLE COPY

SF 71
(Revised 3/79)
OFFICE OF PERSONNEL MANAGEMENT
FPM Supple. 990-2, S 2-9

# APPLICATION FOR LEAVE

71-112

**INSTRUCTIONS:** Please complete Items 1-8 after reading the Privacy Act Statement shown below.

1. Name *(Print or type—Last, First, M.I.)*

2. Employee I.D. Number

3. Organizational Unit

4-A Month / Day / Hour / A.M. P.M. — FROM:

4-B Month / Day / Hour / A.M. P.M. — TO:

4-C Total Number of Hours

5. I hereby request *(If more than one box is checked, explain in Item 6, Remarks)*:

- ☐ Annual Leave. *(Annual leave requested may not exceed the amount available for use during the leave year.)*
- ☐ Sick Leave. *(Complete reverse side of form.)*
- ☐ Leave Without Pay.
- ☐ Compensatory Time.
- ☐ Other. *(Specify)*

6. Remarks

7. Employee's Signature

8. Date *(Month, Day, Year)*

## OFFICIAL ACTION ON APPLICATION

☐ Approved ☐ Disapproved *(If disapproved, give reason. If annual leave, initiate action to reschedule.)*

Signature *(Annual leave approval may not exceed the amount available for use during the leave year.)*

Date *(Month, Day, Year)*

NSN 7540-00-753-5067

*Please detach this notice before submitting SF 71.*

## PRIVACY ACT STATEMENT

Section 6311 of Title 5 to the U.S. Code authorizes collection of this information. The primary use of this information is by management and your payroll office to approve and record your use of leave. Additional disclosures of the information may be: To the Department of Labor when processing a claim for compensation regarding a job connected injury or illness; to a State unemployment compensation office regarding a claim; to Federal Life Insurance or Health Benefits carriers regarding a claim; to a Federal, State, or local law enforcement agency when your agency becomes aware of a violation, or possible violation of civil or criminal law; to a Federal agency when conducting an investigation on you for employment or security reasons; to the Office of Personnel Management or

*(Continued on Reverse)*

**EMPLOYEE**—Check the appropriate box below (Items 1-4) if you are applying for sick leave. If your agency requires such certification, please have your doctor or practitioner complete the Certification section below. Falsification of information in this portion of the form may be grounds for disciplinary action, including dismissal.

1. I was incapacitated for duty by:
   - ☐ Sickness.
   - ☐ On-The-Job Injury.
   - ☐ Off-The-Job Injury.
   - ☐ Pregnancy and Confinement.
2. ☐ I was required to care for a member of my family with a contagious disease. *(Give name and relationship of family member, and name of disease.)*
3. ☐ I will be undergoing medical, dental, or optical examination or treatment.
4. ☐ I was exposed to a contagious disease. *(Give name of disease and circumstances of exposure.)*

## CERTIFICATION OF PHYSICIAN OR PRACTITIONER

Employee's Name

Period Under Professional Care *(Indicate Month, Day, Year)*: From: To:

Remarks

I certify that the employee named was under my professional care for the period indicated above, and that the employee's condition during this period made reporting to work inadvisable

Signature of Physician or Practitioner

Date *(Month, Day, Year)*

General Accounting Office when the information is required for evaluation of leave administration; and to the General Services Administration in connection with its responsibilities for records management.

Where the employee identification number is your Social Security Number, collection of this information is authorized by Executive Order 9397. Furnishing the information on this form, including your Social Security Number, is voluntary, but failure to do so may result in disapproval of this request.

If your agency uses the information furnished on this form for purposes other than these indicated above, it may provide you with an additional statement reflecting those purposes.